

AMENDED IN SENATE MAY 11, 1998

SENATE BILL

No. 1702

Introduced by Senator Rosenthal

February 17, 1998

An act to add Sections 1373.21 and 1373.22 to, ~~to add Article 1.5 (commencing with Section 1345.11) to Chapter 2.2 of Division 2 of, and to repeal and add Sections 1373.19 and 1373.20 of,~~ the Health and Safety Code, relating to health care coverage.

LEGISLATIVE COUNSEL'S DIGEST

SB 1702, as amended, Rosenthal. Health care service plans: liability: arbitration.

Existing law provides that a health care service plan, any entity contracting with a plan, and providers are each responsible for their own acts or omissions, and are not liable for the acts or omissions of, or the costs of defending, others. Existing law sets forth provisions of law regulating the use of binding arbitration by a health care service plan to settle disputes. Willful violation of the law regulating health care service plans is a crime.

This bill would ~~provide that a health care service plan has the duty to exercise ordinary care when making a health care treatment decision and is liable for damages for harm to an enrollee in proportion to, and proximately caused by, its failure to exercise ordinary care. The bill would provide that a health care service plan is also liable for damages for harm to an enrollee in proportion to, and proximately caused by, a health care treatment decision made by any employee, agent,~~

~~ostensible agent, or other representative of the plan who is acting on behalf of the plan and over whom the plan has the right to exercise influence or control, that results in the failure to exercise ordinary care.~~

~~The bill would repeal the provisions of law regulating the use of binding arbitration by a health care service plan. The bill would establish an Independent Arbitration Council to manage an arbitration system to resolve claims authorized to be brought against a health care service plan under the liability provisions established by this bill. The bill would set forth a scheme for regulating the use of arbitration for all other cases or disputes between enrollees and health care service plans require a health care service plan that uses arbitration to settle disputes with enrollees or subscribers to require that a written arbitration decision be provided to the parties. The bill would require a health care service plan to send copies of the decisions, after removing the names of any parties, to the department to be available, upon request, to the public.~~

The bill would authorize the Commissioner of Corporations to prohibit a health care service plan from requiring an enrollee to participate in an arbitration proceeding, following receipt, review, and substantiation of an enrollee grievance that the plan engaged in willful misconduct.

By changing the definition of a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 ~~SECTION 1. The Legislature finds and declares all of~~
2 ~~the following:~~

1 ~~(a) Health care service plans that participate in~~
2 ~~making medical decisions that result in adverse patient~~
3 ~~outcomes should be held liable for damages in proportion~~
4 ~~to the degree of their responsibility for the harmful~~
5 ~~decisions.~~

6 ~~(b) In these cases, liability and damages should be~~
7 ~~determined by a neutral arbitrator appointed by an~~
8 ~~Independent Arbitration Council in order to facilitate a~~
9 ~~fair, swift, and low cost resolution of claims, and to~~
10 ~~promote improvement in the quality of health care~~
11 ~~service plan medical decisions.~~

12 ~~SEC. 2. Article 1.5 (commencing with Section~~
13 ~~1345.11) is added to Chapter 2.2 of Division 2 of the Health~~
14 ~~and Safety Code, to read:~~

15
16 ~~Article 1.5. Arbitration of Liability Claims Against~~
17 ~~Health Care Service Plans~~
18

19 ~~1345.11 (a) A health care service plan has the duty to~~
20 ~~exercise ordinary care when making a health care~~
21 ~~treatment decision and is liable for damages for harm to~~
22 ~~an enrollee in proportion to, and proximately caused by,~~
23 ~~its failure to exercise ordinary care.~~

24 ~~(b) A health care service plan is also liable for damages~~
25 ~~for harm to an enrollee in proportion to, and proximately~~
26 ~~caused by, a health care treatment decision made by any~~
27 ~~employee, agent, ostensible agent, or other~~
28 ~~representative of the plan who is acting on behalf of the~~
29 ~~plan and over whom the plan has the right to exercise~~
30 ~~influence or control, or has actually exercised influence~~
31 ~~or control, that results in the failure to exercise ordinary~~
32 ~~care.~~

33 ~~(c) For purposes of this section, a “health care~~
34 ~~treatment decision” means a determination made when~~
35 ~~a health care service plan arranges for medical services or~~
36 ~~a decision by the health care service plan that affects the~~
37 ~~quality of the diagnosis, care, or treatment provided to an~~
38 ~~enrollee of the plan.~~

39 ~~(d) It shall be a defense to any action asserted against~~
40 ~~a health care service plan if both of the following apply:~~

~~(1) Neither the health care service plan, nor any employee, agent, ostensible agent, or representative for whose conduct the health care service plan is liable under subdivision (b), controlled, influenced, delayed, or participated in the health care treatment decision.~~

~~(2) The health care service plan did not deny or delay payment for any treatment prescribed or recommended by a provider to the enrollee.~~

~~(e) The standards set forth in subdivisions (a) and (b) create no obligation on the part of the health care service plan to provide to an enrollee treatment that is not covered by the health care service plan.~~

~~(f) A health care service plan may not include a provision in a contract with a provider that exempts the plan from liability for the acts or conduct of the plan, and that provision in an existing contract shall be void.~~

~~(g) This section shall not create any liability on the part of an employer or an employer group purchasing organization that purchases coverage or assumes risk on behalf of its employees.~~

~~(h) Any provision of any state law that may prohibit a health care service plan from practicing, or being licensed to practice, medicine, may not be asserted as a defense by the plan in any action brought against it pursuant to this article or any other provision of law.~~

~~1345.12. (a) A person may not maintain a liability claim under this article against a health care service plan unless the affected enrollee or representative of the affected enrollee has exhausted the grievance process offered by the health care service plan pursuant to Section 1368.~~

~~(b) After either completing the grievance process, or participating in the process for at least 60 days, a subscriber or enrollee, or his, her, or its representative, may submit the liability claim to the department for referral to the Independent Arbitration Council established pursuant to subdivision (a) of Section 1345.13. In any case determined by the department to be a case involving an imminent and serious threat to the health of the patient, including, but not limited to, the potential~~

1 ~~loss of life, limb, or major bodily function, or in any other~~
2 ~~case in which the department determines that expedited~~
3 ~~arbitration is warranted, a subscriber or enrollee shall not~~
4 ~~be required to complete the grievance process or~~
5 ~~participate in the process for at least 60 days.~~

6 ~~1345.13. (a) The department shall appoint five~~
7 ~~individuals to serve on an Independent Arbitration~~
8 ~~Council, with the membership composed of a~~
9 ~~representative of a managed care consumer protection~~
10 ~~organization, a physician and surgeon licensed in~~
11 ~~California, an attorney member of the defense bar with~~
12 ~~experience in medical malpractice, a retired judge who~~
13 ~~is not in the business of providing arbitration services, and~~
14 ~~a representative of an employer group that provides its~~
15 ~~employees with health care service plan coverage.~~
16 ~~Prospective appointees shall be screened by the~~
17 ~~department for bias and possible conflicts of interest~~
18 ~~favoring health care service plans, and shall be appointed~~
19 ~~only if the department finds that the individual satisfies~~
20 ~~qualification criteria for independence adopted by the~~
21 ~~department.~~

22 ~~(b) The council shall manage an arbitration system~~
23 ~~used to resolve claims authorized by Section 1345.11, and~~
24 ~~supervise the individual cases within it. The council shall~~
25 ~~ensure that the arbitration system is fair, speedy, low cost,~~
26 ~~and protects the privacy interests of the parties, and that~~
27 ~~the information and decisions generated by the~~
28 ~~arbitration system are used to promote the improvement~~
29 ~~of health care service plan medical decisions.~~

30 ~~(c) The council shall solicit applications from a wide~~
31 ~~variety of firms and individuals who provide neutral~~
32 ~~arbitration services and who meet a set of qualifications,~~
33 ~~which shall include experience, training and expertise.~~
34 ~~The council shall approve a broad master list of qualified,~~
35 ~~neutral arbitration firms and individuals who meet these~~
36 ~~qualifications and who demonstrate and commit that~~
37 ~~they will implement the goals of fairness, timeliness,~~
38 ~~low cost proceedings, and protection of the privacy~~
39 ~~interests of the parties.~~

~~(d) A health care service plan shall send any demand it receives for arbitrating a claim authorized by Section 1345.11, or other comparable notice, to the council, along with a copy to the department, within five business days of receipt. A neutral arbitrator shall be selected within 30 days of receipt by the council of the arbitration demand.~~

~~(e) The health care service plan shall pay the full fee of the neutral arbitrator. If the party making the demand for arbitration demonstrates extreme hardship, the plan shall pay for all of the arbitration costs of the party, as specified by the council. The plan shall disclose this provision to subscribers and enrollees in its evidence of coverage. The council shall notify a party making a demand for arbitration of this provision and, upon request, shall provide an application for relief under this subdivision. The criteria for establishing extreme hardship shall be adopted by the department, in consultation with the council. Approval or denial of the application shall be done in writing by the council with a copy provided to the department.~~

~~(f) The council shall select the neutral arbitrator by providing a list of names to the parties and giving them 10 business days either to agree upon any neutral arbitrator of their choosing, whether or not on the list, or to strike some number of those names on the list with the council choosing from those names not stricken.~~

~~(g) In administering the arbitration program, the council's creation of and selection from lists sent to the parties shall be done in a manner that rotates among qualified neutral arbitrators on the master list created pursuant to subdivision (c).~~

~~(h) The council shall expedite procedures, including the appointment of the neutral arbitrator and setting arbitration deadlines, for cases involving an imminent and serious threat to the health of an enrollee, including, but not limited to, the potential loss of life, limb, or major bodily function, and in other extraordinary circumstances under which delay could seriously jeopardize the health of the enrollee.~~

1 ~~(i) The council may delay appointment of a neutral~~
2 ~~arbitrator for up to 90 days, or for a longer period in~~
3 ~~extraordinary circumstances, and for purposes of~~
4 ~~promoting settlement, upon a written request of the~~
5 ~~party demanding arbitration. If the request is made by~~
6 ~~counsel to a party, a copy shall be provided by counsel to~~
7 ~~the party.~~

8 ~~(j) The council shall maintain a master list of all~~
9 ~~qualified neutral arbitrators and maintain an individual~~
10 ~~file on each one. The file of an individual arbitrator shall~~
11 ~~contain the history of the rulings of the arbitrator in both~~
12 ~~council arbitration cases, and health care service plan~~
13 ~~arbitrations undertaken pursuant to Sections 1373.20,~~
14 ~~1373.21, and 1373.22, including written decisions in those~~
15 ~~cases, if any, as modified pursuant to subdivision (1),~~
16 ~~along with a biography and any additional information~~
17 ~~necessary to enable parties to screen for bias or possible~~
18 ~~conflicts of interest. When a list of potential neutral~~
19 ~~arbitrators is sent to the parties pursuant to subdivision~~
20 ~~(f), a summary of the file information on the proposed~~
21 ~~neutral arbitrators shall be included. The individual files~~
22 ~~of the proposed neutral arbitrators on the list shall be~~
23 ~~made available to parties, and their counsel, upon request~~
24 ~~in a timely manner.~~

25 ~~(k) Neutral arbitrators shall issue written decisions to~~
26 ~~the parties and council. The decisions shall indicate the~~
27 ~~prevailing party, the amount of any award and other~~
28 ~~relevant terms of the award, and the reasons for the~~
29 ~~judgment rendered.~~

30 ~~(l) A copy of a decision of a neutral arbitrator shall be~~
31 ~~kept in the individual file of the arbitrator established~~
32 ~~pursuant to subdivision (j), after the council removes the~~
33 ~~names of the parties, enrollees, physicians, and other plan~~
34 ~~employees, agents, or representatives cited in the~~
35 ~~decision. On a quarterly basis, the council shall send~~
36 ~~copies of the modified decisions to the department, which~~
37 ~~shall make them available upon request to the public, at~~
38 ~~a nominal cost.~~

39 ~~(m) Following one or more public hearing on a draft~~
40 ~~report, the council shall annually issue a final, public~~

1 ~~report to the department with recommendations for~~
2 ~~improving the arbitration program for liability claims~~
3 ~~authorized by this article and for improving health care~~
4 ~~service plan medical decisions.~~

5 ~~1345.14. (a) The decision of the neutral arbitrator~~
6 ~~issued pursuant to subdivision (k) of Section 1345.13 shall~~
7 ~~be the sole remedy available concerning liability for~~
8 ~~damages under subdivisions (a) and (b) of Section~~
9 ~~1345.11.~~

10 ~~(b) Notwithstanding subdivision (a), following~~
11 ~~receipt, review, and substantiation of a complaint that a~~
12 ~~health care service plan has engaged in knowing, willful~~
13 ~~and egregious misconduct in an arbitration proceeding~~
14 ~~undertaken pursuant to this article, the council, by at least~~
15 ~~a majority vote, may prohibit the plan from requiring the~~
16 ~~enrollee to continue to participate in the proceeding, and~~
17 ~~the terms of any agreement with the plan requiring the~~
18 ~~enrollee to submit to binding arbitration to resolve~~
19 ~~liability claims authorized by this article shall be null and~~
20 ~~void for purposes of that proceeding. Following such a~~
21 ~~decision, the party shall be free to pursue its liability claim~~
22 ~~for damages in a court of law.~~

23 ~~(c) The remedy provided to the council in subdivision~~
24 ~~(b) shall not preclude the commissioner from applying,~~
25 ~~in addition, any other remedy authorized by law in~~
26 ~~response to such knowing, willful, and egregious~~
27 ~~misconduct by the health care service plan.~~

28 ~~SEC. 3. Section 1373.19 of the Health and Safety Code~~
29 ~~is repealed.~~

30 ~~SEC. 4. Section 1373.19 is added to the Health and~~
31 ~~Safety Code, to read:~~

32 ~~1373.19. All liability claims authorized pursuant to~~
33 ~~subdivisions (a) and (b) of Section 1345.11 shall be~~
34 ~~arbitrated in accordance with Article 1.5 (commencing~~
35 ~~with Section 1345.11). All other cases or disputes between~~
36 ~~enrollees and health care service plans may be arbitrated~~
37 ~~pursuant to Sections 1373.20, 1373.21, and 1373.22.~~

38 ~~SEC. 5. Section 1373.20 of the Health and Safety Code~~
39 ~~is repealed.~~

1 ~~SEC. 6. Section 1373.20 is added to the Health and~~
2 ~~Safety Code, to read:~~

3 ~~1373.20. (a) Any health care service plan that~~
4 ~~requires its subscribers and enrollees to submit to binding~~
5 ~~arbitration shall provide for selection by the parties of a~~
6 ~~single neutral arbitrator. This provision shall not be~~
7 ~~subject to waiver, except that nothing in this section shall~~
8 ~~prevent the parties to an arbitration from agreeing in~~
9 ~~writing, after a case or dispute has arisen and a demand~~
10 ~~for arbitration has been submitted, and after consultation~~
11 ~~with the independent administrator appointed by the~~
12 ~~plan pursuant to subdivisions (a) and (b) of Section~~
13 ~~1373.21, to use a tripartite arbitration panel. The~~
14 ~~agreement shall clearly indicate, in boldface 12-point~~
15 ~~type, that “A case or dispute subject to binding arbitration~~
16 ~~has arisen between the parties and we mutually agree to~~
17 ~~waive the requirement that cases be adjudicated by a~~
18 ~~single neutral arbitrator.” If the parties agree to waive the~~
19 ~~requirement to use a single neutral arbitrator, the~~
20 ~~enrollee or subscriber shall have three business days to~~
21 ~~revoke the agreement. If the agreement is also signed by~~
22 ~~counsel of the enrollee or subscriber, the agreement shall~~
23 ~~be immediately binding and may not be rescinded.~~

24 ~~(b) In cases in which a single, neutral arbitrator is used,~~
25 ~~the plan shall pay the full fee of the neutral arbitrator. In~~
26 ~~all cases where the plan requests or agrees to a tripartite~~
27 ~~panel, it shall pay for all fees of the neutral arbitrator as~~
28 ~~well as its own party arbitrator.~~

29 ~~(c) In cases in which the party making a demand for~~
30 ~~arbitration demonstrates extreme hardship, the plan shall~~
31 ~~pay all arbitration costs, including all fees for the~~
32 ~~arbitrator of the party in a tripartite panel. The plan shall~~
33 ~~disclose this provision to subscribers and enrollees in its~~
34 ~~evidence of coverage. The independent administrator~~
35 ~~appointed pursuant to subdivisions (a) and (b) of Section~~
36 ~~1373.21 shall notify a party making a demand for~~
37 ~~arbitration of this provision and, upon request, shall~~
38 ~~provide an application for relief under this subdivision.~~
39 ~~The criteria for establishing extreme hardship shall be~~
40 ~~adopted by the department. Approval or denial of the~~

1 application shall be done in writing by the independent
2 administrator with a copy of his or her decision provided
3 to the department.

4 SEC. 7. Section 1373.21 is added to the Health and
5 Safety Code, to read:

6 1373.21. (a) If a health care service plan uses
7 arbitration to settle disputes with enrollees or subscribers,
8 the plan shall use an independent administrator,
9 approved by the department, to manage the arbitration
10 system of the plan and to supervise the individual cases
11 within it. The independent administrator shall ensure
12 that the arbitration system is fair, speedy, low-cost, and
13 protects the privacy interests of the parties.

14 (b) The independent administrator appointed by the
15 plan may not be a provider of arbitration or mediation
16 services. In addition, the independent administrator shall
17 be screened by the department for bias and possible
18 conflicts of interest favoring the plan, and shall be
19 appointed only if the department finds that the individual
20 satisfies qualification criteria for independence adopted
21 by the department.

22 (c) The independent administrator shall solicit
23 applications from a wide variety of firms and individuals
24 who provide neutral arbitration services and who meet a
25 set of qualifications, which shall include experience,
26 training, and expertise. The independent administrator
27 shall approve a broad master list of qualified, neutral
28 arbitration firms and individuals who meet these
29 qualifications and who demonstrate and commit that
30 they will implement the plan's goals of fairness,
31 timeliness, low-cost proceedings, and protection of the
32 privacy interests of the parties.

33 (d) Each plan shall send any demand it receives for
34 arbitration, or other comparable notice, to its
35 independent administrator within five business days of
36 receipt. The neutral arbitrator shall be selected within 30
37 days of receipt by the independent administrator of the
38 arbitration demand.

39 (e) The independent administrator shall select the
40 neutral arbitrator by providing a list of names to the

1 parties and giving them 10 business days either to agree
2 upon any neutral arbitrator of their choosing, whether or
3 not on the list, or to strike some number of those names
4 on the list with the independent administrator choosing
5 from those names not stricken.

6 (f) In administering the arbitration program of the
7 plan, the independent administrator's creation of and
8 selection from lists sent to the parties shall be done in a
9 manner that rotates among qualified neutral arbitrators
10 on the master list created pursuant to subdivision (c).

11 (g) The independent administrator shall take action to
12 expedite procedures, including the appointment of the
13 neutral arbitrator and setting arbitration deadlines, for
14 cases involving an imminent and serious threat to the
15 health of an enrollee, including, but not limited to, the
16 potential loss of life, limb, or major bodily function, and
17 in other extraordinary circumstances under which delay
18 could seriously jeopardize the health of the enrollee.

19 (h) The independent administrator may delay
20 appointment of a neutral arbitrator for up to 90 days, or
21 for a longer period in extraordinary circumstances, and
22 for purposes of promoting settlement, upon a written
23 request of the party demanding arbitration. If the request
24 is made by counsel to a party, a copy shall be provided by
25 counsel to the party.

26 (i) The independent administrator shall maintain a
27 master list of all qualified neutral arbitrators and maintain
28 an individual file on each one. The file of an individual
29 arbitrator shall contain the history of the ruling of the
30 arbitrator in plan arbitrations including both health care
31 service plan arbitrations undertaken pursuant to this
32 section and Sections 1373.20 and 1373.22, and
33 Independent Arbitration Counsel arbitration cases
34 undertaken pursuant to Article 1.5 (commencing with
35 Section 1345.11), including written decisions in those
36 cases, if any, as modified pursuant to subdivision (k);
37 along with a biography and any additional information
38 necessary to enable parties to screen for bias or possible
39 conflicts of interest. When a list of potential neutral
40 arbitrators is sent to the parties pursuant to subdivision

~~(c), a summary of the file information on the proposed neutral arbitrators shall be included. The individual files of the proposed neutral arbitrators on the list shall be made available to parties, and their counsel, upon request in a timely manner.~~

~~(j) Neutral arbitrators shall issue brief written decisions to the parties and the independent administrator. The decisions shall indicate the prevailing party, the amount of any award and other relevant terms of the award, and the reasons for the judgment rendered.~~

~~(k) A copy of a decision of a neutral arbitrator shall be kept in the individual file of the arbitrator established pursuant to subdivision (i), after the independent administrator removes the names of the parties, enrollees, physicians, and other plan employees, agents or representatives cited in the decision. On a quarterly basis, the independent administrator shall send copies of the modified decisions to the department, which shall make them available upon request to the public, at a nominal cost.~~

~~SEC. 8.—~~

SECTION 1. Section 1373.21 is added to the Health and Safety Code, to read:

1373.21. (a) If a health care service plan uses arbitration to settle disputes with enrollees or subscribers, it shall require that a written arbitration decision be provided to the parties that indicates the prevailing party, the amount of any award and other relevant terms of the award, and the reasons for the judgment rendered.

(b) After removing the names of any parties mentioned in the written arbitration decision, including enrollees, physicians, and other plan employees, agents or representatives, the plan, on a quarterly basis, shall send copies of the modified decisions to the department, which shall make them available, upon request, to the public, at a nominal cost.

SEC. 2. Section 1373.22 is added to the Health and Safety Code, to read:

1373.22. ~~(a)~~ Following receipt, review, and substantiation of an enrollee ~~complaint~~ grievance that a

1 health care service plan has engaged in ~~knowing, willful,~~
2 ~~and egregious willful~~ misconduct in an arbitration
3 proceeding, the commissioner may prohibit the plan
4 from requiring the enrollee to continue to participate in
5 the *arbitration* proceeding, and the terms of any
6 agreement with the plan requiring the enrollee to submit
7 to binding arbitration shall be null and void for purposes
8 of that proceeding. Following such a decision, the party
9 shall be free to pursue the dispute in a court of law. The
10 remedy provided to the commissioner in this ~~subdivision~~
11 *section* shall not preclude the use by the commissioner of
12 any other remedy authorized by law.

13 ~~(b) The department shall ensure plan compliance~~
14 ~~with Section 1373.19, 1373.20, and 1373.21 as part of its~~
15 ~~periodic onsite medical survey of each plan undertaken~~
16 ~~pursuant to Section 1380, and shall include a discussion of~~
17 ~~compliance with those sections as part of its report issued~~
18 ~~pursuant to Section 1380.~~

19 ~~SEC. 9.—~~

20 *SEC. 3.* No reimbursement is required by this act
21 pursuant to Section 6 of Article XIII B of the California
22 Constitution because the only costs that may be incurred
23 by a local agency or school district will be incurred
24 because this act creates a new crime or infraction,
25 eliminates a crime or infraction, or changes the penalty
26 for a crime or infraction, within the meaning of Section
27 17556 of the Government Code, or changes the definition
28 of a crime within the meaning of Section 6 of Article
29 XIII B of the California Constitution.

30 Notwithstanding Section 17580 of the Government
31 Code, unless otherwise specified, the provisions of this act
32 shall become operative on the same date that the act
33 takes effect pursuant to the California Constitution.